HONG LEONG FINANCE LIMITED

v.

LIOW HOCK SENG

HIGH COURT MALAYA, JOHOR BAHRU
TUAN HAIDAR BIN MOHD. NOOR J
[ORIGINATING SUMMONS NO. 24-75 OF 1990]
5 SEPTEMBER 1995

PRACTICE & PROCEDURE: *Reciprocal enforcement of judgments - Order for registration of foreign judgment granted - Defendant applying to set aside order for registration - Consideration of s. 5(1) Reciprocal Enforcement of Judgments Act 1958 - Whether the judgment of the original Court has been partially satisfied - Whether the defendant received notice of the proceedings in sufficient time to enable him to defend - Whether the judgment on which registration was sought was a judgment in civil proceedings.*

The plaintiff obtained an order for registration of foreign judgment against the defendant. The defendant applied to set aside the registration of the judgment on the grounds that the judgment of the original Court had been partly satisfied. The defendant argued that as the judgment of the original Court was for the sum of S$372,927.32 with further daily interest and delivery of vacant possession of the property and as the property had been sold before the application for registration, the plaintiff's failure to apply for amendment of the registration of the judgment of the original Court was in contravention of s. 4(4) of the Reciprocal Enforcement of Judgments Act 1958 (the Act).

The defendant further argued that he did not receive notice of the proceedings in sufficient time to enable him to defend and did not appear, as at the time the judgment of the original Court was entered, he had left Singapore and was residing in Johore Bahru. In the circumstances the defendant relied on s. 56(1)(a)(iii) of the Act to have the registered judgment against him set aside.

The defendant also contended that the provisions of the Act applies only to judgments or orders given or made by any Court in civil proceedings, and as the plaintiff as mortgagee had taken a foreclosure action to deprive the defendant of his right to redeem the property, the plantiff did not commence an action and the order for sale which the plaintiff relied on is not final and conclusive.

The defendant's argument that the judgment sum had been fully satisfied from the sale of the property was disposed of shortly on the grounds that the defendant in his affidavit did not dispute the veracity of the statement of accounts put up by the plaintiff on the shortfall.

Held:

[1] It is not disputed that the property was sold in 18 January 1989 and subsequently registered on 23 February 1989, well before the application for the registration of the judgment of the original Court under s. 4 of the Act. In the event the plaintiff's failure to amend the registration of the judgment of the original Court confining the amount to a sum of S$372,927.32 and interest and costs was in contravention of s. 4(4) of the Act. By virtue of s. 3(3)(b) and s. 4(5) of the Act only that part of the judgment relating to the sum of S$372,927.32 with interest and costs may be registered and not that part of the judgment relating to vacant possesion. As there was no application under s. 6(3) of

the Act to order judgment to be registered for the balance remaining payable, the registration of the judgment of the original Court should be set aside under O. 67 r. 9(3) of the Rules of the High Court 1980 (RHC 1980).

[2] It would seem clear from s. 5(1)(a)(iii) of the Act that notwithstanding that the process of substituted service may have been effected on the defendant in accordance with the law of the country of the original Court, on the facts, the defendant did not receive notice of the said proceedings in time to defend the said proceedings. The defendant was not a subject of nor a resident of Singapore when the originating summons was purportedly served on him in Singapore nor when the judgment was obtained. At the time the substituted service was purportedly effected on the defendant he was no longer within the jurisdiction of the original Court and in the circumstances the registration of the judgment of the original Court should be set aside.

[3] The proceedings in the original Court against the defendant proceeded under O. 83 of the Rules of the Supreme Court 1970 of Singapore (RSC). Order 83 of the RSC is similar to O. 83 of the RHC 1980. In the present case what the plaintiff in effect is trying to do is to proceed with the enforcement of the judgment against the defendant for the shortfall and interest after the sale of the property. On the facts of the plaintiff's case, the judgment of the original Court is not a final and conclusive judgment and it could not have constituted a debt which entitled the plaintiff to proceed with enforcement.

[4] As the mortgage action (in Singapore) and the charge action (in Malaysia) are similar and based on the judgment of the Supreme Court in *Kandiah Peter v. Public Bank Bhd.*, the plaintiff should proceed for judgment for the shortfall and interest in the original Court and thereafter apply for registration of the judgment. In the circumstances, as what the plaintiff is trying to enforce is really the shortfall after the sale of the property, it was not just and convenient that the judgment should be enforced.

[Defendant's application to set aside registration of judgment of the original Court allowed with costs].

Cases referred to:
Murugappa Chettiar v. Krishnappa Chettiar & Ors. [1940] 9 MLJ (SSR) 200 ***(refd)***
United Overseas Bank Ltd. v. Tjong Tjui Njuk [1987] 2 MLJ 295 ***(refd)***
Bank of New Zealand v. Wong Kee Tat [1990] 2 MLJ 435 ***(dist)***
Gordon Grant & Co. Ltd. v. F.L. Boos [1926] AC 781 PC ***(refd)***
Kandiah Peter v. Public Bank Bhd. [1994] 1 MLJ 119 ***(foll)***
Leong Yick Realty Co. Sdn. Bhd. v. Asia Commercial Finance (M) Bhd. [1994] 2 MLJ 308 ***(foll)***

Legislation referred to:
Reciprocal Enforcement of Judgments Act 1985, s. 3(3)(b), 4, 4(4), 4(5), 5, 5(1)(a)(iii), 6(3)
Rules of the High Court 1980, O. 67, O. 67 rr. 7, 9, 9(3), O. 83
Rules of the Supreme Court 1970 (Singapore), O. 83
Supreme Court of Judicature Act 1969 (Singapore), s. 16(1)

Other source referred to:
Mallal's Supreme Court Practice, 2nd Edn., p. 1152

For the plaintiff - Fadzilah Mansor; M/s. Jackson & Masacorale
For the defendant - K.S. Dass (Shanti Louis with him); M/s. K. Sila Dass & Partners

JUDGMENT

Haidar Mohd. Noor J:

Hong Leong Finance Limited ('the plaintiffs') filed originating summons on 12 February 1990 against Liow Hock Seng ('the defendant') for:

1. An order that the order of Court dated 6 July 1987 of the High Court of the Republic of Singapore whereby it was adjudged that the abovenamed defendant, Liow Hock Seng do pay to the abovenamed plaintiffs, Hong Leong Finance Limited the sum of S$372,927.32 together with further daily interest in the sum of S$94.97 from 27 January 1987 to date of payment, together with delivery of vacant possession of the whole of Lot 2919/U3 of Mukim 23 shown on Strata Title Plan No. 894 comprising the flattened factory known as 152 Paya Lebar Road #02-01 Citipoint Industrial Complex, Singapore, and costs in the sum of S$3,278.80 may be registered as a judgment in the High Court of Malaya at Johor Bahru pursuant to the Reciprocal Enforcement of Judgments Act 1987 (Revised 1972);

2. that the defendant do pay the costs of the application; and

3. such further or other relief as the Court deems fit in the circumstances.

It is supported by the affidavit of Fadzilah Mansor, an advocate and solicitor having the conduct of the matter and duly authorised by the plaintiffs to depose thereto. The said Fadzilah subsequently filed further affidavit (encl. 4) deposing, *inter alia*:

3. Further thereto and to the best of my information and belief, the property as stated at para. 2 of the order of the High Court of the Republic of Singapore, dated 6 July 1987, has already been auctioned off by the plaintiff whereby the proceeds thereof are insufficient to satisfy the judgment debt which still remains unsatisfied to the amount as stated at para. 3 of my affidavit.

4. To the best of my information and belief, the plaintiffs are intending to enforce the said order of the Court dated 6 July 1987 against the defendant, by way of Bankruptcy proceedings on the amount which still remains unsatisfied and the plaintiffs are therefore desirous and having the said order registered in the High Court of Malaya.

On 10 April 1990 an order for registration of foreign judgment was made by the High Court, Johor Bahru on the application of the plaintiffs with liberty to Liow Hock Seng to apply to set aside the said registration within 12 days after service upon him of notice of such registration pursuant to O. 67 r. 7 of the Rules of the High Court 1980 ('RHC') (see encl. 5).

On 1 November 1990, the defendant filed summons-in-chambers (encl. 8) seeking the following orders:

(a) that the order for registration of foreign judgment dated 10 April 1990 entered in this action against the defendant be set aside;

(b) that all execution and other proceedings against the defendant based upon the said order for registration of foreign judgment be stayed pending the hearing of this application;

(c) that the plaintiffs do pay the costs of and incidental to this application, and

(d) such further or other orders be granted as this Honourable Court may deem fit.

It is supported by the affidavit of the defendant himself setting out the grounds of the application. Subsequently the defendant filed 3 further affidavits (see encls. 11, 15 and 18) and the plaintiffs 2 further affidavits in reply (see encls. 13 and 17).

The defendant was personally served on 20 October 1990 with the notice of registration of a foreign judgment whereby the order of the High Court of the Republic of Singapore dated 6 July 1987 and the order for registration of foreign judgment dated 10 April 1990 were enclosed therein (see affidavit of service of Hamzah bin Md. Tahir at encl. 10). The defendant duly complied with O. 67 r. 9 of RHC by filing the application to set aside the order for registration of foreign judgment dated 10 April 1990.

The originating summons was filed by the plaintiffs pursuant to s. 4 of the Reciprocal Enforcement of Judgments Act 1958 ('the Act') and O. 67 of RHC. Singapore is one of the reciprocating countries under the First Schedule to the Act.

The defendant relied on the following grounds to set aside the order for registration of foreign judgment of the High Court of the Republic of Singapore ('the original Court'):

(1) It has been fully satisfied.

(2) The judgment of the original Court has been partially satisfied.

(3) The defendant did not receive notice of the proceedings in sufficient time to enable him to defend and did not appear.

(4) It is not a judgment in a civil proceedings as the plaintiffs, as mortgagee, took a foreclosure action, i.e., to deprive or bar the mortgagor (defendant) of his right to redeem.

The cases on which the Courts here must or may set aside registered judgments are set out in s. 5 of the Act. The relevant provision, in so far as this case is concerned, would be subsection 1, which reads:

> 5(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment:
>
> (a) shall be set aside if the registering Court is satisfied:
>
> (i) that the judgment is not a judgment which this part applies or was registered in contravention of this Act;
>
> (ii) that the Courts of the Country of the original Court has no jurisdiction in the circumstances of the case;
>
> (iii) that the judgment debtor, being the defendant in the proceedings in the original Court, did not (notwithstanding the process may have been duly served on him in accordance with the law of the Country of the original Court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;
>
> (iv) that the judgment was obtained by fraud;
>
> (v) that the rights under the judgment are not vested in the person by whom the application for registration was made; and

(b) may be set aside if the registering Court is satisfied that the matter in dispute in the proceedings in the original Court had previously to the date of the judgment in the original Court been the subject of a final and conclusive judgment by a Court having jurisdiction in the matter.

In addition thereto O. 67 r. 9(3) of RHC provides:

(3) Where the Court hearing an application to set aside the registration of a judgment registered under the Act is satisfied that the judgment falls within any of the cases in which a judgment may not be ordered to be registered under s. 3(2) of the Ordinance or that it is not just or convenient that the judgment should be enforced in Malaysia or that there is some other sufficient reason for setting aside the registration, it may order the registration of the judgment to be set aside on such terms as it thinks fit.

Grounds

(1) It has been fully satisfied

From the order of the original Court dated 6 July 1987 (Exhibit 'FM1' in encl. 2) the defendant was ordered to pay a sum of S$372,927.32 together with further daily interest at the rate of S$94.97 from 27 January 1987 to date of payment. According to the affidavit of Fadzilah Mansor (encl. 2) the judgment which remained unsatisfied as at 15 February 1989 amounted to S$340,033.39 together with daily interest in the sum of S$92.46 and based on the rate of exchange prevailing at 15 February 1989 of 10 Singapore Dollars to 11.87 Malaysian Ringgit, came to RM403,619.63 and the daily interest in the sum of RM109.75 accruing thereon.

In addition thereto, the defendant was ordered to deliver to the plaintiffs vacant possession of the whole of Lot 2919/U3 of Mukim 23 shown on Strata Title Plan No. 894 comprising the flattened factory known as 152 Paya Lebar Road #02-01 Citipoint Industrial Complex, Singapore ("the property").

The defendant was ordered to pay the plaintiffs costs on a solicitor and client basis in the sum of S$3,278.80.

It would appear to be not disputed that the property was transferred on 18 January 1989 (after the judgment obtained on 6 July 1987) to Chong Loy Seuk and Tan Siew Hong by the plaintiffs as the mortgagee in escrow for a sum of S$464,100. The said transfer was subsequently registered in the Registry of Titles, Singapore on 23 February 1989 (see Exhibits 'LHS A' and 'LHS B' in encl. 11). As the judgment sum was S$372,927.32 plus daily interest from 27 January 1987 to 18 January 1989 (the date of transfer of the property) in the sum of S$68,473.37 and costs in the sum of S$3,278.80 making a total sum of S$444,679.49 as due and owing, the defendant contended that by virtue of the sale price of the factory for S$464,100, the sum due from the defendant to the plaintiffs has been fully satisfied. The defendant further contended that there is in fact a sum of money due to him from the plaintiffs being the difference between the sale price of the property and the judgment sum, interest and costs. However, the plaintiffs contended that it was not as simple as the defendant made it out to be.

From encls. 13, 15, 17 and 18 details of the accounts of the defendant and the subsequent sale of the property were set out therein. However, from para. 6 of the affidavit of the defendant (encl. 18) it would appear that the defendant no longer disputed the veracity of the statement of accounts put up by the plaintiffs on the shortfall. In effect the defendant seemed to admit a sum of RM407,809.23 as at 11 November 1990 as being the shortfall and interest after the sale of the property, but contended that the plaintiffs have not obtained any judgment for the said sum and reiterated that the said debt of RM407,809.23 as at 7

November 1990 does not constitute a debt which entitles the plaintiffs to proceed with enforcement proceedings. I will deal with this issue later in my judgment. Suffice for me to say that on the ground that the judgment had been satisfied relied on by the defendant failed.

(2) The judgment of the original Court has been partially satisfied.

The judgment of the original Court that was registered in the High Court here is for the sum of S$372,927.32 together with further daily interest at the rate of S$94.97 from 27 January 1987 to date of payment and delivery of vacant possession of the property to the plaintiffs and also costs. In the further affidavit of Fadzilah Mansor dated 30 March 1990 it was deposed that the property has already been auctioned off by the plaintiffs. However, according to her the proceeds were insufficient to satisfy the judgment debt which still remains unsatisfied. It is not disputed that the property was sold on 18 January 1989 and subsequently registered on 23 February 1989, well before the application of the registration of the judgment of the original Court here under s. 4 of the Act. In the event quite apart from her further affidavit, the learned Counsel, Fadzilah Mansor should have applied to the High Court here to amend the registration of the judgment of the original Court confining to the sum of S$372,927.32 and the interests and costs only. Failure to do so would, in my view, contravene s. 4(4) of the Act which reads:

> (4) If at the date of the application for registration the judgment of the original Court has been partly satisfied, the judgment shall not be registered in respect of the whole sum payable under the judgment of the original Court, but only in respect of the balance remaining payable at that date.

By virtue of s. 3(3)(b) and s. 4(5) of the Act, only that part of the judgment relating to the sum of S$372,927.32 interest and costs may be registered in this country and not that part of the judgment relating to vacant possession. In any event as the property was sold in 1989, the plaintiffs' claim for vacant possession is untenable. Neither has the learned Counsel for the plaintiffs made an application to Court under s. 6(3) of the Act when this matter came before me to order judgment to be registered for the balance remaining payable at that date.

In the circumstances, the registration of the judgment of the original Court should be set aside (see O. 67 r. 9(3) of RHC).

(3) The defendant did not receive notice of the proceedings in sufficient time to enable him to defend and did not appear.

According to the further affidavit of the defendant (encl. 15) he worked in Singapore as the managing director of Gelvin Engineering Pte. Ltd. until 21 October 1986 under an employment pass and resided at No. 43 Lipo Avenue, Singapore 2678. Due to the closure of the business of the said Gelvin Engineering Pte. Ltd., his employment pass was cancelled by the Singapore Authorities on 21 October 1986 and he returned to Johor Bahru to permanently reside there. (See Exhibits 'LHS A', 'LHS B' and 'LHS C'). Although the defendant did visit Singapore after 21 October 1986 for short durations he did not thereafter reside nor has an address in Singapore.

The judgment of the original Court was entered against the defendant by way of default of appearance **on 6 July 1987**. Apparently service of the originating summons of the original Court was effected on the defendant by way of substituted service *vide* advertisement in the Straits Times in Singapore on 24 April 1987 and posted on the notice board of the Supreme Court on 24 April 1987 also (Exhibit 'LHS D'). As the defendant had been staying in Johor Bahru **after 21 October 1986** and thereafter had no business dealings in Singapore he

therefore had no notice of the proceedings and had no opportunity to defend himself in the said proceedings against him and did not appear. The first time he had notice of the said proceedings against him and the judgment of the original Court dated 6 July 1987 was when he was served with the said order of the original Court by the plaintiffs' solicitors *vide* their letter dated 11 July 1987 (see Exhibit 'LHS F'). The defendant claimed that the plaintiffs had full knowledge of his address in Johor Bahru and he was no more residing in Singapore. His address in Johor Bahru is No. 68, Jalan Jerau Satu, Taman Pelangi, Johor Bahru. The plaintiffs denied this claim. However, Exhibit 'LHS F' clearly supported the defendant's claim.

The defendant therefore contended that the service is bad as the plaintiffs should have proceeded to serve the originating summons of the original Court by way of service out of jurisdiction nor gave him notice of the said proceedings began against him in Singapore. He relied on s. 5(1)(a)(iii) of the Act to have the registered judgment against him be set aside.

It would seem clear to me from s. 5(1)(a)(iii) of the Act that notwithstanding that process of substituted service may have been effected on him in accordance with the law of the country of the original Court, on the facts, he did not receive notice of the said proceedings in time to defend the said proceedings and therefore he did not appear. The defendant was not a subject of nor a resident of Singapore when the originating summons was purportedly served on him in Singapore nor when the judgment was obtained. In this respect Gordon-Smith, Ag. J.A. in *Murugappa Chettiar v. Krishnappa Chettiar & Ors.* [1940] 9 MLJ (SSR) 200 by way of *obiter* said at p. 203:

> It is true that the judgment of a foreign Court obtained in default of appearance would not be enforced in an English Court, where the defendant, at the time the suit was commenced, was not a subject of nor resident in the country in which the judgment was obtained ...

The facts and circumstances of this case would seem to come within the purview of s. 5(1)(a)(iii) of the Act.

On the issue of service of the proceedings, relating to jurisdiction, Chua J in *United Overseas Bank Ltd. v. Tjong Tjui Njuk* [1987] 2 MLJ 295 (Singapore case), *inter alia*, held:

> (1) the debtor was not carrying on business in Hong Kong nor was she within the jurisdiction of the original Court at the time the writ was purported to be served on the debtor under O. 10 r. 1(2)(b);
>
> (2) before the creditor can serve the writ on the debtor in the manner provided for by O. 10 r. 1(2)(b), the debtor must be within the jurisdiction of the original Court. The creditor had therefore not complied with the rules of the Supreme Court of Hong Kong;
>
> (3) the service was therefore bad and the registration of the said judgment should be set aside.

In the present case at the time the substituted service was purportedly effected on the defendant, he was no longer within the jurisdiction of the original Court.

The case of *Bank of New Zealand v. Wong Kee Tat* [1990] 2 MLJ 435, relied on by the learned Counsel for the plaintiffs, has no application as the facts are different. In the *Bank of New Zealand's* case, the defendant had been properly served with the notice of the concurrent writ on 6 May 1988. He chose not to enter an appearance and file his defence against the claim. His reason is that the original Court had no jurisdiction over him. He did not succeed by virtue of s. 16(1) of the Supreme Court of Judicature Act 1969 of Singapore.

On this ground, the registration of the judgment in the High Court, Johor Bahru should be set aside.

(4) **It is not a judgment in a civil proceedings as the plaintiffs, as mortgagee took a foreclosure action, i.e., to deprive or bar the mortgagor (defendant) of his right to redeem.**

The defendant contended that the Act applies only to judgments or orders given or made by any Court in civil proceedings and as the plaintiffs did not commence any action, the order for sale obtained on 6 July 1987 which the plaintiffs are relying on is not final and conclusive.

The said proceedings in the original Court against the defendant proceeded under O. 83 of the Rules of the Supreme Court 1970 of Singapore ('RSC'). Order 83 of RSC is similar to O. 83 of RHC though there are following difference between the Malaysian order and the Singapore order. They are:

(i) In Malaysia it is called a charge action whereas in Singapore it is called a mortgage action.

(ii) A charge takes effect upon registration whereas a mortgage takes effect immediately upon execution.

(iii) A mortgage conveys the title to the land to the mortgagee subject to the equity of redemption, while a charge merely makes the land a security for the loan.

Otherwise the incidents of a charge in Malaysia and a mortgage in Singapore are, for all practical purposes, the same (see p. 1152 of *Mallal's Supreme Court Practice*, 2nd Edn.).

In an action under O. 83 of RSC the plaintiffs are merely asking for an order for delivery of the property and for a subsequent sale by the plaintiffs as the mortgagee under a power of sale in a deed of assignment and mortgage in escrow. Therefore the defendant contended that the order is not a judgment or a decree as the plaintiffs are not commencing an action but merely exercised the statutory remedy under O. 83 of RSC. What the plaintiffs in effect are trying to do is to proceed with the enforcement of the judgment against the defendant here for the shortfall and interest after the sale of the property on 18 January 1989. (See the further affidavit of Fadzilah Mansor at encl. 4). In that event the judgment of the original Court could not possibly be in respect of the shortfall and interest after the sale of the property (see Exhibits 'WEC2' and 'WEC3' in encl. 13). It would seem clear that in respect of a sale of a mortgaged property, the mortgagee is not precluded from suing the mortgagor upon his personal covenant in the mortgage for the difference between the sum due under the mortgage and that realised by the sale (see *Gordon Grant & Co. Ltd. v. F.L. Boos* [1926] AC 781 PC). On the facts of the plaintiffs' case, the judgment of the original Court is not a final and conclusive judgment. It could not have constituted as a debt which entitled the plaintiffs to proceed with enforcement.

As the mortgage action and the charge action, as I said earlier, are similar except for the minor differences and based on the Supreme Court judgment in *Kandiah Peter v. Public Bank Bhd.* [1994] 1 MLJ 119 and my own judgment in *Leong Yick Realty Co. Sdn. Bhd. v. Asia Commercial Finance (M) Bhd.* [1994] 2 MLJ 308, (no appeal was filed) the plaintiffs should proceed for judgment for the shortfall and interest in the original Court and thereafter apply for registration of the judgment in the Court here.

I am of the view that it is not just or convenient that the judgment should be enforced here when what the plaintiffs are trying to enforce is really the shortfall after the sale of the property.

In the circumstances the defendant had by grounds (2), (3) and (4) satisfied me that the Order of the Court registering the judgment of the original Court should be set aside and I so ordered accordingly with costs.